Postal Regulatory Commission
Submitted 9/17/2013 10:54:28 AM
Filing ID: 87859
Accepted 9/17/2013

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners: Ruth Y. Goldway, Chairman;
Nanci E. Langley, Vice Chairman;
Mark Acton;
Tony Hammond; and
Robert G. Taub

Competitive Products List
Adding Round Trip Mailer **Docket No. MC2013-57**

FEDERAL EXPRESS CORPORATION COMMENT ON THE SCOPE OF THE POSTAL MONOPOLY

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September 17, 2013

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FEDERAL EXPRESS CORPORATION COMMENT ON THE SCOPE OF THE POSTAL MONOPOLY

Federal Express Corporation ("FedEx") respectfully files these comments in response to statements about the scope of the postal monopoly raised in the Additional Comments filed by Netflix, Inc. ("Netflix") on September 11, 2013. In brief, Netflix claims that the carriage of DVDs and similar electronic disks is covered by the postal monopoly over the carriage of "letters".[1] Netflix's comments were submitted in opposition to statements by the U.S. Postal Service ("the Postal Service") in its original Request to Create Round-Trip Mailer Product (July 26, 2013) to the effect the carriage of such items is not covered by the postal monopoly.[2] FedEx agrees with the Postal Service that DVDs are not covered by the postal monopoly — but bases its position on reasons different from those advanced by the Postal Service — and disagrees with the position of Netflix.

1. Reliance by Netflix and the Postal Service on the Postal Service's current postal monopoly regulations is misplaced because these regulations are ultra vires and legally void.

Assertions of both Netflix and the Postal Service as to the scope of the postal monopoly are grounded in a fundamentally incorrect legal premise: that the scope of the monopoly is determined by substantive regulations adopted by the Postal Service. The Postal Accountability and Enhancement Act of 2006 (PAEA) divested the Postal Service of any authority with respect

[1] Netflix, "Additional Comments of Netflix, Inc. Submitted Pursuant to Order No. 1827" (Sep 11, 2013), Docket MC2013-57, 7-12 (hereafter "Netflix Additional Comments").
[2] U.S. Postal Service, "Request of the United States Postal Service Under Section 3642 to Create Round-Trip Mailer Product" (July 26, 2013), Attachment A at 5-7 (hereafter "Postal Service Request").

adoption of substantive regulations defining the scope of the postal monopoly. At least four provisions of the PAEA bar the Postal Service's continued exercise of such authority.

- *The PAEA excluded the postal monopoly provisions of Title 18 from the rulemaking authority of the Postal Service*.

  The PAEA amended the rulemaking authority of the Postal Service so that it now provides the Postal Service may adopt "such rules and regulations, not inconsistent with this title, as may be necessary *in the execution of its functions under this title* and such other functions as may be assigned to the Postal Service under provisions of law outside of this title."[3] Since the postal monopoly is created by provisions of Title 18 (federal criminal code), it is not a function of "this title," i.e., Title 39. Nor does anything in Title 18 empower the Postal Service to administer the postal monopoly. Hence, the Postal Service has no authority to adopt substantive postal monopoly regulations. On the contrary, the legislative history of the PAEA makes clear that the purpose of this narrowing of the definition of the Postal Service's rulemaking authority was intended to "make clear that the Postal Service is not, unless explicitly authorized by Congress, empowered to adopt regulations implementing other parts of the U.S. code, e.g., the criminal laws."[4]

- *The PAEA repealed the provision which the Postal Service claimed as authority to "suspend" the postal monopoly*.

  The statutory provision which the Postal Service claimed (wrongly) as authority for regulations "suspending" the postal monopoly was former 39 U.S.C. § 601(b).[5] This subsection was cited as the statutory basis for both the express "suspensions" of the monopoly found in 39 C.F.R. Part 320 and for suspensions underlying the "non-letter" status of certain items found in the definition of a "letter" in 39 C.F.R. § 310.1(a)(7).[6] Without such "suspensions," the overbroad definition of "letter" set out in 39 C.F.R. § 310.1(a)(1) would prohibit private delivery of, inter alia, checks and other commercial papers, legal papers and documents, matter sent for filing or storage, and printed matter such as newspapers, books, and catalogs. The purported suspension authority was thus absolutely integral to the entire set of postal monopoly regulations. Without the suspensions, the Postal Service's broad definition would have provoked a fierce political

[3] Postal Accountability and Enhancement Act, Pub. L. No. 109-435, § 504, 120 Stat. 3198, 3235, *amending* 39 U.S.C. § 401(2) (emphasis added). Under prior law, the Postal Service was authorized "to adopt, amend, and repeal such rules and regulations *as it deems necessary to accomplish the objectives of this title*" (emphasis added).
[4] H.R. Rep. No. 66, 109th Cong., 1st Sess. 59 (Apr. 28, 2005).
[5] Postal Accountability and Enhancement Act, Pub. L. No. 109-435, § 503(a), 120 Stat. 3198, 3234, *repealing* 39 U.S.C. § 601(b) and *enacting* new subsections (b) and (c), now 39 U.S.C. §§ 601(b), (c) (2012).
[6] Current postal monopoly regulations *continue to cite the repealed version of §601(b)* as statutory authority. See 39 C.F.R. §§ 310.1(a)(1) n. 1, 320.1 n. 1.

revolt, as indeed it did when the regulations were first proposed in 1973. Without the suspension authority, the definition of "letters" is politically unsustainable. [7]

- *The PAEA barred the Postal Service from adopting any regulation "the effect of which is to preclude competition or establish the terms of competition.*"

  See § 404a(a)(1).

- *The PAEA vested future rulemaking authority over the postal monopoly in the Commission, not the Postal Service.*

  See § 601(c).

There is no need for an extensive exposition of these four points. The scope of the postal monopoly after PAEA is analyzed in detail in Postal Regulatory Commission, *Report on Universal Postal Service and the Postal Monopoly* (2008).[8]

Each one of these new statutory prevents the Postal Service from adopting substantive regulations defining the postal monopoly. Taken collectively, there can be no doubt that arguments by Netflix and the Postal Service that are grounded in the scope of the postal monopoly as defined by *current* Postal Service regulations, 39 C.F.R. Parts 310 and 320 (2013), are wholly misplaced. Those regulations are ultra vires and legally void.

2. A DVD containing an electronic publication, such as a game or film, is not a "letter" within the scope of the statutory postal monopoly.

In the absence of postal monopoly regulations adopted by the Commission pursuant to § 601(c), the scope of the postal monopoly is defined by the postal monopoly statutes themselves. For present purposes, this means 18 U.S.C. § 1696(a) and 39 U.S.C. § 601. The evolution of the U.S. postal monopoly law is an extraordinarily long and complicated tale that does not need to be repeated here. It is already told in the Commission's report cited above.

In the current context, the bottom line is this. The scope of the present postal monopoly is limited to the carriage of "letters" as that term was used in the postal act of 1872.[9] There is no legislative history from that period that, as in modern legislative practice, sheds light on the meaning of the term "letters". Although the term "letters" has been variously interpreted over the years, the most authoritative, reasonably contemporaneous interpretation was issued by Attorney General Wayne

[7] See Postal Regulatory Commission, *Report on Universal Postal Service and the Postal Monopoly* (2008), Appendix C, "Postal Monopoly Laws: History and Development of the Monopoly on the Carriage of Mail and the Monopoly on Access to Mailboxes" (hereafter "*Report on Universal Postal Service*, App. C").
[8] *Report on Universal Postal Service*, App. C. Chapter 11 of Appendix C provides a comprehensive analysis of the scope of the postal monopoly in the wake of the PAEA and is appended to this comment as an Attachment.
[9] Act of Jun. 8, 1872, ch. 335, 17 Stat. 283. This act was a codification and revision of the entire body of postal laws at the time. The evolution of the postal monopoly provisions of this act through repeated codifications is described in *Report on Universal Postal Service*, App. C.

MacVeagh in 1881. The Postmaster General asked MacVeagh to interpret the scope of the postal monopoly because businesses such as insurance companies were using private companies to deliver commercial documents rather than paying first class mail rates. The Postmaster General argued that commercial documents were first class matter and therefore "letters" within the postal monopoly. The Attorney General did not contest that such documents were first class matter but denied that they were "letters" covered by the postal monopoly.

> In my opinion, it is no violation of R.S., Secs. 3982 and 3985 [current 18 U.S.C. §§ 1696(a), 1694, respectively] for an express company to transport the documents mentioned in yours of 15th instant., viz., manuscript for publication, deeds, transcripts of record, insurance policies, &c.
>
> It is prohibited, and an offence, to carry "letters or packets." What is a letter I can make no plainer than it is made by the idea which common usage attaches to that term. From the connection in which it is used, I have no doubt that "packets" means a package of letters.[10]

By this standard, DVDs are not what "common usage" in 1872 would refer to as a "letter". Electronic text in the form of telegraphic transmissions were well known to Congress in 1872, yet neither telegraphic transmission nor hard copy telegrams were considered to be "letters". While video recordings were obviously unknown in 1872, Congress was familiar with "photographic representations of different types" and clearly distinguished them from "letters" in the 1872 act.[11] Today's electronic games recorded on DVDs contain information which is sold in a standard electronic format that is completed with input from the owner, not unlike paper forms of 1872. All commercial DVDs contain information that is replicated in multiple copies, i.e., "published." Thus modern DVDs are akin to telegrams, photographs, commercial documents, and printed matter[12] of the nineteenth century, none of which would have been considered "letters" by Attorney General MacVeagh.

An extended exegesis on this point is unnecessary. There is no plausible argument that a DVD falls within the scope of the "letter" monopoly as enacted by Congress in the postal act of 1872.

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[10] For the background for this conclusion by the Attorney General, see *Report on Universal Postal Service*, App. C., at 122-26.

[11] "Photographic representations of different types" were classified as third class matter, whereas "letters" were classified as first class matter. See Act of Jun. 8, 1872, ch. 335, §§ 130-133, 17 Stat. 283, 300-01.

[12] The only case to hold squarely that a printed publication (an advertisement) is a "letter" covered by the postal monopoly was *Associated Third Class Mail Users v. United States Postal Service*, 600 F.2d 824 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 837 (1979). In that case, a divided court effectively deferred to the Postal Service's rulemaking authority. Since the Postal Service has been divested of rulemaking over the postal monopoly, the precedential effect of the ACTMU decision is questionable. In any case, the court was uninformed about critical historical facts including Attorney General MacVeagh's 1881 opinion. See *Report on Universal Postal Service*, App. C, at 205-13.

3. Section 601(b)(3) grandfathers administrative exemptions for the private of carriage of "non-letters" such as (1) sound recordings and films and (2) photographic material but does <u>not</u> codify limitations and restrictions incorporated into those administrative exemptions.

In the 2005 version of the postal monopoly regulations, just as in the current version of the postal monopoly regulations, the definition of "letter" in Part 310 includes a list of elaborately defined "non-letters" set out in 39 C.F.R. § 310.1(a)(7). A footnote to this paragraph declares that some or all of these "non-letters" result from an exercise of the Postal Service's purported suspension authority under former 39 U.S.C. § 601(b). In its Additional Comments, Netflix cites the definitions of two "non-letters" as set out in the current postal monopoly regulations and argues that these administrative definitions of "non-letters" demonstrate that the DVDs at issue in this case are "letters" and therefore within the scope of the postal monopoly. As noted above, Netflix's comments are misplaced insofar as they rely upon an interpretation of *current* postal monopoly regulations since these regulations are ultra vires. However, since the specific definitions of "non-letters" in current postal monopoly regulations are the same as in the 2005 postal monopoly regulations and since suspensions in the 2005 regulations were in some measure codified by the PAEA, it is appropriate to consider the further question whether Netflix's arguments may retain currency as interpretations of the "non-letter" suspensions that have been codified by statute.

Answering this question correctly requires a clear understanding of what was and what was not codified from the Postal Service's 2005 postal monopoly regulations by the PAEA. The PAEA added a new exemption from the "letter" monopoly, § 601(b)(3), which provides that a letter may be carried out of the mail when:

> (3) carriage is within the scope of services described by regulations of the United States Postal Service (including, in particular, sections 310.1 and 320.2-320.8 of title 39 of the Code of Federal Regulations, as in effect on July 1, 2005) that purport to permit private carriage by suspension of the operation of this section (as then in effect).

The purpose of this "grandfather" provision was to create a safe harbor for persons who operated within the terms of an administrative suspension adopted by the Postal Service before the PAEA was enacted. Without such a safe harbor, the lawfulness of existing services might be called into question by PAEA's repeal of the purported suspension authority. Accordingly, § 601(b)(3) exempts all services "*within* the scope of services described by regulations . . . that purport to permit private carriage by suspension." Section 601(b)(3) does *not* prohibit private carriage of services *outside* the scope of such suspensions. The lawfulness of any service outside the scope of such administrative suspensions must be determined by reference to other provisions defining the scope of the postal monopoly.

In adopting § 601(b)(3), Congress took care to make clear that it was grandfathering services within the scope of administrative suspensions but *not* incorporating regulatory restrictions or conditions on the supply of those services. As the Senate committee report explained,

> The intent of this provision [is] to continue to allow private carriage under those circumstances in which private carriage is purportedly permitted by current Postal Service "suspensions" of the monopoly *but not to continue provisions in the Postal Service regulations that purport to condition or limit use of such "suspensions,*" e.g., a requirement that customers of private carriers must permit otherwise unauthorized inspections by postal inspectors.[13]

Thus, the purposes of the list of "non-letters" set out the 2005 postal monopoly regulations and the corresponding exemptions grandfathered by § 601(b)(3) are fundamentally different. The former administrative suspensions say, in effect, "You can do this but not that". The grandfathered exemptions say only "You can certainly do this."

In the instant case, Netflix points to the definitions of two specific "non-letters", (1) photographic material and (2) sound recordings and films, which are contained in subparagraphs (ix) and (xi) of 39 C.F.R. § 310.1(a)(7) (in both current and 2005 versions). These "non-letters" are defined as follows:

> (ix) Photographic material being sent by a person to a processor and processed photographic material being returned from the processor to the person sending the material for processing.
>
> (xi) Sound recordings, films, and packets of identical printed letters containing messages all or the overwhelming bulk of which are to be disseminated to the public. The ''public'' does not include individuals residing at the place of address; individuals employed by the organization doing business at the place of address (whether or not the actual place of employment is the place of address); individuals who are members of an organization, if an organization is located at the place of address; or other individuals who, individually or as members of a group, are reasonably identifiable to the sender.

Quoting from these definitions, Netflix argues that the DVDs relevant to this case should be considered similar to photographic material under subparagraph (ix) [14] or sound recordings and films under subparagraph (xi). Since the DVD delivery service proposed by the Postal Service do

[13] S. Rept. No. 108-318, 108th Cong., 2d Sess. 54 (Aug. 25, 2004) (emphasis added). The House committee report expresses a similar intent. H.R. Rep. No. 66, 109th Cong., 1st Sess. 58 (Apr. 28, 2005). See generally, *Report on Universal Postal Service*, App. C, at 236-42.

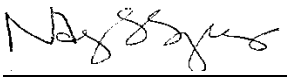
[14] Of course, since "photographic representations of different types" were plainly distinguished from letters in the 1872 statute (see previous section), the proposition that films are "letters" under any circumstances shows how far the postal monopoly regulations had drifted from the intent of Congress.

not fit within the limited definitions of non-letters adopted in these regulations, says Netflix, the DVDs "must therefore be letters subject to the postal monopoly."[15]

This conclusion is based on a false premise. The Postal Service's narrow 2005 administrative definitions of "non-letters" such as photographic material, sound recordings, and films are now relevant to the scope of the postal monopoly *only insofar that they were incorporated into the grandfather exemption set out in § 601(b)(3)*. That is, the administrative definitions of photographic material, sound recordings, and films found in § 310.1(a)(7) of the 2005 postal monopoly regulations now, as grandfathered by § 601(b)(3), serve only to define safe harbors for delivery services that are definitely permitted to operate outside the scope of the postal monopoly. After enactment of the PAEA, these narrow administrative definitions of "non-letters" cannot be read to limit the right to provide other delivery services for similar items outside of the limited circumstances set out in the 2005 administrative definitions.

More generally, reading the 2005 postal monopoly regulations as a whole, it is apparent the narrow administrative definitions for "non-letters" imply coverage by the postal monopoly *only* because of the overbroad definition of "letters" adopted by those regulations. If one disregards the purported suspensions and looks only at the underlying definition of the "letter" monopoly asserted in the 2005 postal monopoly regulations and then compares that assertion with the statutory monopoly actually granted by Congress in the postal act of 1872, it is self-evident that the administrative definition of "letters" bears virtually no relation to the statutory term "letters." In interpreting the scope of postal monopoly, there is no responsible alternative to returning to the words of the statute, as noted above.

Respectfully submitted,



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September 17, 2013

[15] Netflix Additional Comments at 11-12.

ATTACHMENT

PAEA AND THE CURRENT STATUS OF THE MONOPOLY LAWS

Chapter 11 of Postal Regulatory Commission, *Report on Universal Postal Service and the Postal Monopoly* (2008), Appendix C, "Postal Monopoly Laws: History and Development of the Monopoly on the Carriage of Mail and the Monopoly on Access to Mailboxes."

11 PAEA and the Current Status of the Monopoly Laws

On December 21, 2006, the Postal Accountability and Enhancement Act (PAEA) modified the postal monopoly law in significant respects. It created new statutory exceptions to the postal monopoly statutes: for letters charged more than six times the stamp price, for letters weighing more than 12.5 ounces, and for a grandfather exception that includes situations in Postal Service regulations purported to "suspend" the postal monopoly. The PAEA also apparently repealed the authority of the Postal Service to adopt substantive regulations implementing the monopoly statutes. Nonetheless, the Postal Service has continued to maintain both its postal monopoly and mailbox monopoly regulations. The PAEA vested the Commission with new authority to administer elements of the postal monopoly statutes and to police the Postal Service's use of its rulemaking authority. A review of the interaction between the PAEA and the complex legacy of the monopoly laws suggests several legal issues for which answers are not self-evident. Since the Commission has not yet adopted regulations or otherwise addressed implemented these new powers, this chapter presents what is necessarily a preliminary evaluation of the effects of the PAEA on the monopoly laws and the current status of those laws.

11.1 Price Limit Exception

The PAEA added a new price limit exception to the postal monopoly that is set out in section 601(b)(1) of the Title 39. It provides that

> (b) A letter may also be carried out of the mails when—
>
> (1) the amount paid for the private carriage of the letter is at least the amount equal to 6 times the rate then currently charged for the 1st ounce of a single-piece first class letter;

For example, since the rate for one ounce single-piece first class letter was $ 0.42 in June 2008, a letter could be carried out of the mails by a private carrier if the shipper paid the carrier $2.52 or more.

The new section does not explain how to calculate the minimum payment for a shipment of multiple letters, a normal occurrence in commerce . Suppose A wants to send B a large envelope containing two smaller envelopes each of which includes a separately composed letter. Is A required to pay the private carrier $ 2.52 or $ 5.04? In the absence of Commission regulations clarifying this point, the most plausible answer seems to be that a shipment of letters

may be carried out of the mail whenever the shipper pays the carrier $ 2.52 or more for a shipment, regardless of the number of individual letters included in the shipment. This result seems implied by a comparison of the PAEA provision with the Postal Service's pre-PAEA suspension for urgent letters, 39 C.F.R. § 320.8. According to paragraph (c) of the suspension regulation, a letter may be carried out of the mails if the shipper pays the carrier at least $ 3.00 or twice the applicable U.S. postage, whichever is greater. For a shipment of multiple letters, the calculation of "applicable postage" is based on the weight of the total shipment, not the weight of the individual letters.[622] Under the urgent letter suspension (using June 2008 postage rates), to transport a large envelope carrying six one-ounce letters out of the mails, a shipper must pay a carrier at least $ 3.36 (twice the applicable postage, $ 1.68). If the new PAEA exception were calculated on the basis of $ 2.52 for each individual letter, the shipper would have to pay the carrier at least $15.12 to ship the same envelope by private carrier. Since the purpose of the PAEA provision seems to have been to expand the scope for private carriage, it appears most plausible that the price limit should be applied on a shipment basis.

11.2 Weight Limit Exception

The PAEA also added a new weight limit exception to the postal monopoly set out in section 601(b)(2) of the Title 39 which provides that

> (b) A letter may also be carried out of the mails when— . . .
>
> (2) the letter weighs at least 12 ½ ounces;

For reasons discussed above in the context of the price limit exception, the most plausible interpretation of this exception seems to be that a shipment of letters may be carried out of the mails if shipment as a whole weighs more than 12.5 ounces regardless of the number of individual letters inside the shipment.

[622] 39 C.F.R. 320.8(c) (2006) provides: "If a single shipment consists of a number of letters that are picked up together at a single origin and delivered together to a single destination, the applicable U.S. postage may be computed for purposes of this paragraph as though the shipment constituted a single letter of the weight of the shipment. If not actually charged on a letter-by-letter or shipment-by-shipment basis, the amount paid may be computed for purposes of this paragraph on the basis of the carrier's actual charge divided by bona fide estimate of the average number of letters or shipments during the period covered by the carrier's actual charge."

11.3 Grandfather Exception

The third new exception to the postal monopoly added by the PAEA is set out in section 601(b)(3) of the Title 39 and provides that,

> (b) A letter may also be carried out of the mails when— . . .
>
> (3) such carriage is within the scope of services described by regulations of the United States Postal Service (including, in particular, sections 310.1 and 320.2-320.8 of title 39 of the Code of Federal Regulations, as in effect on July 1, 2005) that purport to permit private carriage by suspension of the operation of this section (as then in effect).

This exception permits carriage of a letter out of the mails if "such carriage is within the scope of services described by regulations" in effect in 2005 "that purport to permit private carriage by suspension."[623] The precise contours of the grandfather exception are unclear due to the complexity of the Postal Service regulation referenced. Authority to clarify the bounds of the grandfather exception is vested in the Commission. The following discussion, therefore, is only a preliminary description of this exception.

It seems apparent that the grandfather exception is intended to include all of the private carriage described in the sections 320.2 to 320.8 of the Postal Service's regulations, i.e., carriage of certain data processing materials, letters of colleges and universities, urgent letters, advertisements in parcels or periodicals, and international remail. These seem clearly "services described by regulations that purport to permit private carriage by suspension." Moreover, it appears clear from legislative history, if not from the statutory language, that what is included in the grandfather exception is the right to provide "such carriage" but not the regulatory restrictions attached to the suspensions, such as, for example, the obligation to admit postal inspectors for otherwise unauthorized inspections or the obligation to submit records to the Postal Service. The most recent House committee report explains this grandfather exception as follows:

> The "grandfather clause" provided in the bill will authorize the continuation of private activities that the Postal Service has

[623] The postal monopoly regulations were not amended between the 2005 and 2006 editions of the Code of Federal Regulations. For simplicity of exposition, the analysis of the scope of the grandfather exception will refer to the 2006 edition of C.F.R. instead of the 2005 edition.

> permitted under color of this section [former § 601(b)]. In this way, the bill *protects mailers and private carriers who have relied upon regulations that the Postal Service* has adopted to date in apparent misinterpretation of the current subsection (b). . . .
>
> The suspension for outgoing international mail would be continued, to the extent that it involves the uninterrupted carriage of letters from a point within the United States to a foreign country for delivery to an ultimate destination outside the United States. *However, the requirement that a shipper or carrier submit to an inspection or audit or face a presumption of violation would not be continued.*[624]

The most recent Senate committee report similarly explains:

> The proposed amendment would repeal the Postal Service's authority to suspend the postal monopoly exception for stamped letters—an antiquated and never used authority—and to codify the exemptions to the postal monopoly that the Postal Service has adopted to date in apparent misinterpretation of the suspension provision. The intent of this provision to continue to allow private carriage under those circumstances in which private carriage is purportedly permitted by current Postal Service "suspensions" of the monopoly *but not to continue provisions in the Postal Service regulations that purport to condition or limit use of such "suspensions," e.g., a requirement that customers of private carriers must permit otherwise unauthorized inspections by postal inspectors.*[625]

The grandfather exception also permits private carriage within the scope of services described by section 310.1 where the services are "services described by regulations that purport to permit private carriage by suspension." How this provision should be interpreted is less apparent. In section 310.1, paragraph (a)(7) lists twelve types of items that are stated to be "not letters within the meaning of these regulations." These are:

> (i) Telegrams.
>
> (ii) Checks, drafts, promissory notes, bonds, other negotiable and nonnegotiable financial instruments . . . when shipped to, from, or between financial institutions. . . .
>
> (iii) Abstracts of title, mortgages and other liens, deeds, leases, releases, articles of incorporation, papers filed in lawsuits or

[624] H.R. Rep. No. 66, 109th Cong., 1st Sess. 58 (Apr. 28, 2005) (emphasis added).

[625] S. Rept. No. 108-318, 108th Cong., 2d Sess. 54 (Aug. 25, 2004) (emphasis added).

> formal quasi-judicial proceedings, and orders of courts and of quasi-judicial bodies.
>
> (iv) Newspapers and periodicals.
>
> (v) Books and catalogs consisting of 24 or more bound pages with at least 22 printed, and telephone directories. . . .
>
> (vi) Matter sent from a printer, stationer, or similar source, to a person ordering such matter for use as his letters. . . .
>
> (vii) Letters sent to a records storage center exclusively for storage, letters sent exclusively for destruction, letters retrieved from a records storage center, and letters sent as part of a household or business relocation.
>
> (viii) Tags, labels, stickers, signs or posters . . .
>
> (ix) Photographic material being sent by a person to a processor and processed photographic material being returned from the processor to the person sending the material for processing.
>
> (x) Copy sent from a person to an independent or company-owned printer or compositor . . . and proofs or printed matter returned from the printer or compositor to the office of the person who initially sent the copy.
>
> (xi) Sound recordings, films, and packets of identical printed letters containing messages all or the overwhelming bulk of which are to be disseminated to the public. . . .
>
> (xii) Computer programs recorded on media suitable for direct input. . . .

From the administrative history of (a)(7), described above, it is evident that the Postal Service originally regarded its definition of "letter" to include items (ii) through (vii) and that the Postal Service never disclaimed that interpretation. Indeed, it seems clear that items (ii) through (vii) are encompassed by the definition of "letter" set out in section 310.1(a)(1) to (a)(6). In shifting these items from the suspension section of the proposed regulations, Part 320, to the definitional section, Part 310, the Postal Service did not change the definition of "letter" set out in (a)(1) to (a)(6). It only added a footnote to section (a)(7) indicating that it might regard these items as "letters" which could be carried out of the mails by virtue of a suspension:

> Several of the items enumerated in this paragraph (a)(7) do not self-evidently lie outside of the definition of "letter". To the extent, however, that there is any question whether these items may properly be excluded by definition, *the Postal Service has determined by adoption of these regulations that the restrictions of*

> *the Private Express Statutes are suspended pursuant to 39 U.S.C. 601(b).*[626]

In light of this history, it seems most plausible to interpret the Postal Service's regulations as indicating that items (ii) through (vii) are "services described by regulations that purport to permit private carriage by suspension." If this interpretation is correct, then private carriage of items (ii) through (vii) would be included in the grandfather exception.

A similar conclusion seems applicable to the other items in (a)(7)—item (i) and items (viii) through (xii)—but the chain of reasoning is less certain because the administrative history is less clear. Items (viii) through (xii) were added to (a)(7) by the 1979 amendments to the postal monopoly regulations. In proposing the addition of these items to (a)(7), the Postal Service referred to the new provisions as "exclusions" rather than "suspensions."[627] In the same announcement, item (i), referring to telegrams, is also described as an "exclusion" rather than a suspension. All of these items would seem to be encompassed within the definition of "letter" set out in (a)(1) to (a)(6) but for being listed in (a)(7). All are qualified by the same footnote that qualifies items (ii) through (vii)—the footnote invoking to Postal Service's suspension authority. Since the Postal Service did not have an "exclusion" authority that was distinct from its purported "suspension" authority, it seems most plausible to interpret the Postal Service's regulations as indicating that items (i) and (viii) through (xii) are likewise "services described by regulations that purport to permit private carriage by suspension."

This conclusion also seems supported by a consideration of legislative history of PAEA. It appears reasonably clear that the objective motivating the grandfather exception was that, as the House committee states, it "protects mailers and private carriers who have relied upon regulations that the Postal Service has adopted." While one could argue that some of these items are not within the definition of "letters" and therefore not covered by the grandfather exception, the result could be put mailers and carriers at risk for relying upon Postal Service regulations. The precise scope of the term "letters" is unclear and the overriding purpose of this provision (judging from the language quoted from the House committee report) was to give legal certainty

[626] 39 C.F.R. 310.1(a)(7) n. 1 (2006) (emphasis added).

[627] *See* 43 Fed. Reg. 60616-17 (Dec. 28, 1978) ("proposed expanded language in this exclusion [for books and catalogs]"; "the proposed exclusion [for tags, etc.]"; "new exclusion [for photographic materials]"; "proposed exclusion [for sound recordings]").

to those who relied upon Postal Service regulations. Since nonletters are excluded from the postal monopoly in any case, including all of items (i) and (viii) to (xii) in the grandfather exception will further the Congressional purpose for creating legal certainty while, at worst, doing no legal harm (i.e., by redundantly declaring that certain nonletters are outside a postal monopoly over the carriage of letters). In light of such considerations, then, it seems most plausible to regard private carriage of items (i) and (viii) to (xii) in paragraph (a)(7) as covered by the grandfather exception.

The grandfather exception is not limited to private carriage within the scope of services listed in sections 310.1 and 320.2 to 320.8. It applies to all "services described by regulations that purport to permit private carriage by suspension." Sections 310.1 and 320.2 to 320.8 are specified only as particular instances of such sections ("including, in particular"). What other types of private carriage could be encompassed by the grandfather exception? After sections 310.1 and 320.2 to 320.8, the section of the Postal Service regulations which is most significant for private carriage is section 310.3[628] which sets out regulations implementing five of the six traditional statutory exceptions: the cargo letter exception, letters of the carrier exception, private hand exception, special messenger exception, and prior-to-posting exception. As discussed above, the regulations related to one of these exceptions, the prior-to-posting exception, appear to permit private carriage of letters in circumstances where it is not permitted by statute.[629] Section 310.3(e) permits private carriage of letters from a mailer to a distant downstream post office or postal facility. The statute permits private carriage only to the post office or postal facility *nearest* the mailer.

Whether or not the grandfather exception should be deemed to include private carriage permitted by the exceptions set out in section 310.3 depends on issues similar to those considered in the case of items (i) and (viii) through (xii) in paragraph 310.1(a)(7). The regulations do not explicitly say that private carriage is being permitted under authority of the purported suspension power. On the other hand, private carriage that is inconsistent with the postal monopoly statutes is being permitted by regulation and seemingly the only power that could be relied upon by the

[628] 39 C.F.R. § 310.3 (2006).

[629] 39 C.F.R. § 310.2(d) (2006) restates the § 310.3 exceptions to the postal monopoly in more abbreviated form. The discussion in the text applies to § 310.2(d) in the same manner as to § 310.3.

Postal Service to do so is the suspension power. The statutory language of the grandfather exception seems to contemplate the possibility of grandfathering private carriage outside the scope of 310.1 and 320.2 to 320.8. Shippers and private carriers have relied on these regulatory "exceptions" from the postal monopoly, and the overriding intent of the grandfather exception seems to be to protect shippers and carriers who have relied on the regulations. In light of these considerations, it seems most plausible to interpret the grandfather exception to include private carriage where permitted by the exceptions listed in section 310.3.

Sections 310.2(b)(2) and (c) are additional regulatory provisions under which the Postal Service purportedly permitted private carriage. These provisions provide as follows:

> (b) Activity described in paragraph (a) of this section [referring to the postal monopoly statutes] is lawful with respect to a letter if: . . .
>
> (1) [statutory provisions of the stamped envelope exception, 39 U.S.C. 601(a)]
>
> (2)(i) The activity is in accordance with the terms of a written agreement between the shipper or the carrier of the letter and the Postal Service. Such an agreement may include some or all of the provisions of paragraph (b)(1) of this section, or it may change them, but it must;
>
> (A) Adequately ensure payment of an amount equal to the postage to which the Postal Service would have been entitled had the letters been carried in the mail;
>
> (B) Remain in effect for a specified period (subject to renewals); and
>
> (C) Provide for periodic review, audit, and inspection.
>
> (ii) Possible alternative arrangements may include but are not limited to:
>
> (A) Payment of a fixed sum at specified intervals based on the shipper's projected shipment of letters for a given period, as verified by the Postal Service; or
>
> (B) Utilization of a computer record to determine the volume of letters shipped during an interval and the applicable postage to be remitted to the Postal Service.
>
> (c) *The Postal Service may suspend the operation of any*

> *part of paragraph (b)* of this section where the public interest requires the suspension.[630]

In brief, sections 310(b) and (c) state that private carriage which is otherwise prohibited by the postal monopoly statutes is "lawful" if it is "in accordance with the terms of a written agreement between the shipper or the carrier of the letter and the Postal Service." This "agreement exception" is provided in addition to the stamped envelope exception established by statute and set out in section 310.2(b)(1). If While the terms of the agreement may "adequately ensure payment of an amount equal to the postage to which the Postal Service would have been entitled had the letters been carried in the mail," the Postal Service "may suspend the operation of" this requirement as well. The legal and policy considerations which argue for interpreting the statutory grandfather exception to include private carriage purportedly permitted under other administrative exceptions seem to apply to this administrative "agreement exception" as well.

In sum, the proper interpretation of the scope of the grandfather exception is not self-evident. Nonetheless, preliminarily, it appears most plausible that the grandfather exception permits private carriage where such carriage is within the scope of services described by regulations 310.1(a)(7), 310(b)(2), 310.3, and 320.2 to 320.8 of Title 39 of Code of Federal Regulations in effect on July 1, 2005.

11.4 Amendments to Postal Service Rulemaking Authority

The PAEA included four provisions which modify the Postal Service's rulemaking authority with respect to the postal monopoly statutes and the mailbox monopoly statute.

First, the PAEA changed the scope of section 401(2) of Title 39, which defines the Postal Service's rulemaking authority. The former statute authorized the Postal Service "to adopt, amend, and repeal such rules and regulations as it deems necessary *to accomplish the objectives of this title.*"[631] The revised version authorizes the Postal Service to "to adopt, amend, and repeal such rules and regulations, not inconsistent with this title, *as may be necessary in the execution of its functions under this title* and such other functions as may be assigned to the Postal Service

[630] 39 C.F.R. §§ 310.2(b)-2(c) (2006) (emphasis added).

[631] 39 U.S.C. § 401(2) (2006)

under provisions of law outside of this title."[632] This amendment naturally presents the question whether rules and regulations administering the monopoly statutes in Title 18 are "necessary in the execution of " the Postal Service's functions under Title 39.

The answer to this question does not appear self-evident from the terms of the statute. A reasonable person could argue that regulations implementing the monopoly statutes are "necessary in the execution" of universal postal service, one of the "functions" of the Postal Service provides under Title 39. On the other hand, a reasonable person could argue that nothing in the present version Title 39 specifically commits to the Postal Service to the function of administering the monopoly laws other than the limited function of searching for and seizing illegally transported letters. While the monopoly *statutes* may assist the Postal Service in the execution of its functions under Title 39, the additional assistance provided by Postal Service *regulations* is marginal. Since the Postal Service cannot by regulation alter the scope of the monopoly statutes,[633] its regulations can only contribute appropriate clarification. The legal question is not whether the postal monopoly and mailbox monopoly *statutes* are necessary to allow the Postal Service to execute its functions under Title 39, but whether *regulations* issued by the Postal Service are necessary to that purpose. Since, in broad terms, universal postal service was achieved was in the United States before the Post Office Department or Postal Service issued substantive postal monopoly regulations and since another agency, the Department of Justice, is more specifically vested with authority to enforce the criminal provisions which establish the postal monopoly and mailbox monopoly, the most plausible conclusion is that Postal Service is not authorized to adopt regulations implementing the criminal statutes in Title 18.

Legislative history supports the view that the intention underlying the amendment to section 401(2) was to divest the Postal Service of general authority to adopt regulations

[632] 39 U.S.C. § 401(2) (2006), *amended by* Postal Accountability and Enhancement Act, Pub. L. No. 109-435, § 504, 120 Stat. 3198, 3235.

[633] Given the Postal Service's broad interpretation of "letter"in the postal monopoly statutes, almost the only consequence of the Postal Service's postal monopoly regulations is to reduce the scope of the monopoly by creating explicit or implicit suspensions. Since the suspension authority was repealed by PAEA, it will no longer be necessary, or lawful, for the Postal Service to exercise this function.

implementing the monopoly statutes.[634] The most recent House committee report states that, "This amendment is intended to make clear that the Postal Service is not, unless explicitly authorized by Congress, empowered to adopt regulations implementing other parts of the U.S. code, e.g., the criminal laws."[635] The most recent Senate committee report notes that the Postal Service is authorized to adopt rules with respect to some functions outside of Title 39 but conspicuously fails to mention Title 18, "This amendment is intended to make clear that the Postal Service is not empowered to adopt regulations implementing other parts of the U.S. Code unless explicitly authorized to do so by Congress. . . . The amendment recognizes that the rulemaking authority of the Postal Service is affected by its obligations under title 5 and certain other limited provisions of law outside Title 39."[636] Both committees agreed that the intention of the amendment was to divest the Postal Service of authority to issue regulations implementing titles of the United States Code other than Title 39 unless "explicitly" authorized to do so. In light of these committee reports, it seems difficult to interpret the revised version of section 401(2) as "explicitly" authorizing the Postal Service to adopt regulations implementing the provisions of the monopoly statutes in Title 18.

It is undeniable that Congress amended the rulemaking authority of the Postal Service. It may be presumed that there was some purpose for this amendment. The revised language seems clearly to narrow the scope of rulemaking. In light of legislative history, the most plausible interpretation of the revised rulemaking provision appears to be that Congress divested the Postal Service of general authority to adopt regulations implementing the criminal portions of the monopoly statutes. Moreover, since the revised complaint procedure, section 3662,[637] authorizes the Commission to determine whether the Postal Service has lawfully exercised its authority

[634] In floor consideration of the PAEA, the only reference to the amendment of the rulemaking authority of the Postal Service seems to have been a question put to Tom Davis of Virginia, the chairman of the House Committee on Government Oversight and Reform. He was asked "to clarify how rulemaking by the Postal Service should consider the circumstances within the postal sector." Chairman Davis, "The committee intends that the Postal Service will exercise *the more clearly delineated rulemaking powers* provided under this section in a way that is rationally related to the policy objectives set out in the revised statute, and it is predicated upon an understanding of the effect the regulations will have on the conditions in the postal sector."152 Cong. Rec. H6512 (Jul. 26, 2005) (emphasis added). These remarks suggest that Congress intended to narrow 39 U.S.C. § 401(2) in some respect but do not shed much light on what authority was eliminated by the revision.

[635] H.R. Rep. No. 66, 109th Cong., 1st Sess. 59 (Apr. 28, 2005).

[636] S. Rep. No. 318, 108th Cong., 2d Sess. (Aug. 25, 2004).

[637] 39 U.S.C. § 3662 (2006).

under section 401(2), it appears to be within the authority of the Commission to provide a definitive interpretation of this provision.

Second, the PAEA added section 404a to the Title 39.[638] This section limits the rulemaking authority of the Postal Service as follows:

> (a) Except as specifically authorized by law, the Postal Service may not—
>
> (1) establish any rule or regulation (including any standard) the effect of which is to preclude competition or establish the terms of competition unless the Postal Service demonstrates that the regulation does not create an unfair competitive advantage for itself or any entity funded (in whole or in part) by the Postal Service;

Since any regulation implementing the monopoly laws would seem to "preclude competition or establish the terms of competition," the effect of this provision appears to require that any regulation implementing the monopoly statutes must not "create an unfair competitive advantage." This prohibition appears to suggest the Postal Service is not authorized to adopt regulations prohibiting private companies from competing with the Postal Service. Since section 404a(b) authorizes the Commission to adopt regulations implementing section 404a, it appears to be within the authority of the Commission to provide a definitive interpretation of this provision.

Third, the PAEA authorized the Commission to adopt the regulations necessary to implement section 601 of Title 39. Section 601(c) provides, "Any regulations necessary to carry out this section shall be promulgated by the Postal Regulatory Commission." By its terms, this provision appears to exclude the possibility that the Postal Service may also adopt regulations to implement section 601. Moreover, section 401(2) limits the rulemaking authority of the Postal Service to rules "not inconsistent with this title."

Fourth, the PAEA repealed former section 601(b) of Title 39, the statutory provision upon which the Postal Service relied to adopt regulations that purport to permit private carriage by suspension of the stamped envelope exception. Since the suspensions are integral to the definition of the postal monopoly, repeal of the suspension authority appears to call into question the post-PAEA validity of the entire set of set of regulations.

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[638] 39 U.S.C. § 404a (2006).

In sum, it appears that the PAEA repealed the authority of the Postal Service to adopt substantive rules defining the postal monopoly and the mailbox monopoly laws.

In December 2007, the Federal Trade Commission (FTC) came to a similar conclusion with respect to the Postal Service's rulemaking over the postal monopoly statutes. The FTC's observation was included in a report required by the PAEA on the application of laws to the Postal Service's competitive products and to similar produces provided by private companies.[639] The FTC concluded that the PAEA "repealed the statutory authority for the USPS to issue regulations to define the scope of its monopoly."

> *The PAEA also repealed the statutory authority for the USPS to issue regulations to define the scope of its monopoly.* The Act also specifically prohibits the USPS from establishing any rule or regulation "the effect of which is to preclude competition or establish the terms of competition unless the Postal Service demonstrates that the regulation does not create an unfair competitive advantage for itself or any entity funded (in whole or in part) by the Postal Service." The extent to which the PAEA grants the PRC the authority to issue regulations that 69 define the scope of the letter monopoly is unclear. 39 U.S.C. § 601(c) provides that the PRC may promulgate "any regulation necessary to carry out" the section of the PAEA codifying the exceptions to the PES (39 U.S.C. §§ 601(a)-(b)). It is unclear, however, whether this legislative grant of authority includes the ability to issue regulations that further refine the scope of the postal monopoly.[640]

In this discussion, the FTC cited the PAEA's amendments to section 601 and inclusion of new section 404a but did *not* consider the effect of the amendment to section 401(2). Perhaps for this reason, the FTC did not address whether the PAEA has also repealed the Postal Service's rulemaking authority over the mailbox monopoly statutes.[641]

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[639] Postal Accountability and Enhancement Act, Pub. L. 109-435, §703, 120 Stat. 3198, 3244 (2006).

[640] Federal Trade Commission, "Accounting for Laws That Apply Differently to the United States Postal Service and its Private Competitors," at 16 (Dec. 2007) (emphasis added, footnotes omitted).

[641] See id. 16-18. On the other hand, the FTC did suggest that the Postal Service's Domestic Mail Manual provisions implementing the mailbox monopoly may exceed the scope of section 1725 of Title 18. The FTC's study states, "The USPS's regulations that define the mailbox monopoly may go beyond the scope of 18 U.S.C. § 1725, which prohibits only the depositing of 'mailable matter' into a mailbox with 'the intent to avoid payment of lawful postage.' Because competitive products do not require postage, it is unclear that Congress intended Section 1725 to apply to competitive products (which, of course, did not exist at the time Congress enacted Section 1725). The Domestic Mail Manual also restricts items placed upon, supported by, attached to, hung from, or inserted into a mailbox. Id. The USPS does not classify door slots, nonlockable bins or troughs used with apartment house

Despite the PAEA's modifications in the Postal Service's rulemaking authority, the Postal Service has not revised or withdrawn regulations which implement the postal monopoly and mailbox monopoly statutes. The current version of the Code of Federal Regulations (July 1, 2008 edition) includes Parts 310, 320, and 959. These implement provisions of the postal monopoly laws, including sections 1693 to 1699 of Title 18 and section 601 of Title 39. They also purport to suspend the "operation of 39 U.S.C. 601(a)(1) through (6)," apparently under authority section former 601(b) of Title 39, a provision repealed by the PAEA.[642] Similarly, the current version of the Domestic Mail Manual (May 12, 2008 edition) includes section 508.3.1.1, designating letter boxes subject to section 1725 of Title 18, and sections 508.3.1.2 and 508.3.2.10, creating limited exemptions from section 1725 of Title 18.[643]

In general, a federal agency may not adopt regulations in excess of rulemaking authority delegated to it by Congress even if the regulations may, in the view of the agency, serve the public interest.[644] The continuing validity, after enactment of the PAEA, of Postal Service's regulations implementing the postal monopoly and the mailbox monopoly statutes may therefore be reasonably questioned.

The Postal Service's mailbox monopoly regulations may, however, not be entirely dependent upon the mailbox monopoly statute for their validity. As noted above, the *Rockville Reminder* case appears to hold that the Postal Service may establish an *administrative* mailbox monopoly by regulations issued under authority of section 101 of Title 39 without relying upon the mailbox monopoly statute, section 1725 of Title 18. Although addressing a different legal issue, the Supreme Court's analysis in *Council of Greenburg Civic Associations* appears to support this conclusion, for the majority of the Court accepted the view that Congress and Postal Service regulations had placed private mailboxes under the control of the Postal Service. The Postal Service regulation that establishes a mailbox monopoly is section 508.3.1.3 of the

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mailboxes, or support posts as subject to these restrictions. Postal Service, *Domestic Mail Manual* § 508.3.1.2 (May 12, 2008 ed). Further, the Postal Service allows customers to attach newspaper receptacles to their mailbox posts, and for newspapers 'regularly mailed as periodicals' to be placed in the mailboxes of 'rural route and highway contract route' subscribers on Sundays or holidays. Id. § 508.3.2.10-11. The USPS also prevents any private delivery to Post Office boxes. Id. § 508.4.4.2." Id. at 17 n. 74.

[642] 39 C.F.R. Parts 310, 320 (2008).

[643] Postal Service, *Domestic Mail Manual* (May 12, 2008 ed).

[644] *See* MCI Telecommunications Corp. v. American Telephone & Telegraph Co., 512 U.S. 218 (1994).

Domestic Mail Manual. It declares "no part of a mail receptacle may be used to deliver any matter not bearing postage, including items or matter placed upon, supported by, attached to, hung from, or inserted into a mail receptacle." This regulation does not cite 18 U.S.C. § 1725 as its legal basis. Judging from the case law, it does it require the mailbox monopoly statute for its legal authority.[645] Similarly, section 508.3.2.11 of the Domestic Mail Manual allows householders to attach a receptacle for receipt of newspapers to the post of a curbside mailbox. This regulation, too, appears to be independent of the mailbox monopoly statute.

To the extent that the Postal Service's mailbox monopoly regulations are not grounded in Title 18, the continuing validity of these regulations may be unaffected by the PAEA's modification of the Postal Service's rulemaking authority, section 401(2). However, it could be still argued that the mailbox monopoly regulations "preclude competition or establish the terms of competition" and that therefore, under new section 404a, they must be reviewed to ensure that they do not "create an unfair competitive advantage."

11.5 Status of the Postal Monopoly over the Carriage of "Letters and Packets"

The PAEA did not modify the postal monopoly statutes. The scope of the monopoly over the carriage of "letters and packets" is therefore unchanged except that, as discussed in the previous section, it appears that the courts and affected parties must now interpret the statutes themselves rather than relying upon regulations of the Postal Service.

Although the Supreme Court has not defined the scope of the postal monopoly since enactment of the current postal monopoly statutes in 1872, it has seemingly prescribed the methodology for doing so. In 1988 in the *Regents of the University of California* case the Court interpreted two statutory exceptions to the postal monopoly: the letters-of-the-carrier exception and the private hand exception. With respect to the letters-of-the-carrier exception, the Court reviewed the 1896 opinion of Attorney General Harmon, the legislative history of the act adding the exception to the Criminal Code of 1909, and the interpretation of the exception in the 1915 *Erie Railroad* case. With respect to the private hands exception, the Court reviewed the postal ordinance of 1782, the postal act of 1792, the legislative history and text of the 1845 act,

[645] Indeed, the regulation appears to exceed the scope of the mailbox monopoly statute since it restricts the use to which a mailbox may be put and not merely what may be deposited in the mailbox.

contemporary dictionaries, and the construction of the act by the *Thompson* court and by the Attorney General. The Court then concluded,

> *The parties and the United States as amicus curiae have focused their arguments largely on Postal Service regulations* construing the "letters of the carrier" and the "private hands" exceptions. With respect to the "letters of the carrier" exception, the Postal Service has consistently read the statute to require that the letters be written by or addressed to the carrier. Even before the Service issued formal regulations, it espoused this view in periodic pamphlets it published describing the reach of the Private Express Statutes. See, e.g., United States Post Office Dept., Restrictions on Transportation of Letters 16-17 (4th ed.1952). . . .
>
> Appellant and the United States have urged us to defer to these agency constructions of the statute. While they reach a different conclusion as to the proper application, appellees specifically indicated at oral argument that they were not challenging the validity of the regulations. Tr. of Oral Arg. 33. *Because we have been able to ascertain Congress' clear intent based on our analysis of the statutes and their legislative history, we need not address the issue of deference to the agency.*[646]

In the wake of the PAEA, in order to determine the status of the postal monopoly over "letters and packets," it appears that a similar historical and legal analysis must be undertaken.

Since 1872, the only judicial analysis of the scope of the postal monopoly over "letters and packets" that approaches the careful methodology of the Supreme Court in *Regents* is found in the *ATCMU* case in 1979. In that case, the Court of Appeals for the D.C. Circuit analyzed the legal history of the postal monopoly in detail. In the course of the proceeding, the Postal Service provided a detailed analysis of the statutory and administrative development of the postal monopoly statutes, although the court apparently lacked knowledge of some key historical facts. In the end, the Court of Appeals did not wholly endorse or reject an expansive statutory interpretation advanced by the Postal Service; rather, it deferred to the rulemaking authority of the Postal Service in the absence of clearly demonstrated error.

In sum, the present status of the postal monopoly over "letters and packets" seems to be as follows. The postal monopoly today includes those items which Congress intended to include in the term "letters and packets" when it enacted the postal code of 1872. It appears that the

[646] Regents of Univ. of Cal. v. Public Empl. Rel. Bd., 485 U.S. 589, 602 (1988) (emphasis added).

Postal Service is no longer authorized to adopt substantive regulations defining the scope of the postal monopoly statutes, although its views on statutory interpretation—last detailed in the course of the ATCMU case—must still be given appropriate consideration. It appears to be settled law that the term *packet* refers to a packet of letters, so the scope of the postal monopoly turns on the meaning of the term *letters*. With one trivial exception,[647] the courts have not defined the scope of statutory term *letters* other than by deference to regulations of the Postal Service which, after PAEA, can not command deference. Hence, there exists no authoritative construction of what Congress intended by the term *letters* in the postal code of 1872. On balance, the evidence uncovered in this study suggests that the most plausible interpretation of the term *letters* as used in the postal code of 1872 is that it referred to personal written correspondence and that the term did not to include certain types of commercial documents subject to first class postage, much less matter in other classes of mail such as newspapers (second class), advertisements (third class), or books (fourth class). The history of the postal monopoly law is a vast forest, however, and reasonable persons may be able to divine more than one trail.

Finally, the PAEA authorized the Commission to adopt "any regulations necessary to carry out" section 601 of Title 39. It appears that the Commission could plausibly conclude that it should adopt a definition of the term "letters" for the purposes of implementing section 601. Whether or not the Commission should take this step or not appears committed to the sound discretion of the Commission. Because of the close relation between section 601 of Title 39 and the private express provisions in Title 18, it seems possible that any decision by Commission interpreting the term "letter" in section 601 would be considered tantamount to defining the scope of the postal monopoly.

[647] National Ass'n of Letter Carriers v. Independent Postal Systems, 336 F. Supp. 804 (W.D. Okla. 1971), *aff'd* 470 F. 2d 265 (10th Cir. 1972). The district court's discussion of the term *letter* was superficial when compared to the standard of statutory and legislative exegesis set by the Supreme Court in *Regents of Univ. of Cal. v. Public Empl. Rel. Bd.*, 485 U.S. 589, 602 (1988).